Supreme Court of the United States.

No. 108.—October Term, 1903.

James G. James, Appellant, vs. George H. Appel. } Appeal from the Supreme Court of the Territory of Arizona.

[January 4, 1904.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an appeal from a judgment of the Supreme Court of the Territory of Arizona dismissing an appeal because taken too late. The appellees recovered a sum from the appellant in the court of first instance, and after judgment was entered the appellant moved for a new trial. The judge who tried the case, being unable to attend, made an order in chambers continuing the motion to another term. At a later term, after several similar continuances, the motion was overruled, and the appellant then appealed to the Supreme Court of the Territory. These events took place before the passage of the Arizona Revised Statutes of 1901. (See par. 1479.) It is assumed that the appeal was too late if the judgment became final at the term when it was rendered, Revised Statutes of Arizona, 1887, par. 849, and we may assume further that the ground of dismissal was the paragraph of the Revised Statutes, requiring that motions for new trials "shall be determined at the term of the court at which the motion shall be made," R. S. 1887, par. 837, and the further provision of par. 842. By the latter, as amended in 1891, "when upon motion a new trial is denied," a review by the Supreme Court is provided for, and it then is enacted that "in case there shall be no ruling on said motion for a new trial during the term at which it was filed then said motion shall be denied and the questions that may have been raised thereby shall be subject to review by the Supreme Court as if said motion had been overruled and exceptions thereto reserved and entered on the minutes of the court." Acts of 1891, No. 49, p. 69.

The Arizona par. 837 is copied from a similar section in the Texas code. Act of May 13, 1846, § 112, Hart's Dig. Texas Code, Art. 766, 1 Sayles, Texas Civil Stats., Art. 1372. Long before its adoption in Arizona the latter section had been construed in Texas as mandatory and as discharging a motion by operation of law if not acted upon at the same term. It was held to put it out of the power of the court to postpone the motion for a new trial to the next term and then to act upon it. If the requirement could

be avoided by a continuance it would be made almost nugatory. *McKean* v. *Ziller*, 9 Tex. 58; *Bullock* v. *Ballew*, 9 Tex. 498; *Bass* v. *Hays*, 38 Tex. 128. When a statute is taken in this way from another, even a foreign, State, it generally is presumed to be adopted with the construction which it has received. *Tucker* v. *Oxley*, 5 Cranch, 34, 42; *Henrietta Mining and Milling Co.* v. *Gardner*, 173 U. S. 123, 130; *Commonwealth* v. *Hartnett*, 3 Gray, 450. See *Coulam* v. *Doull*, 133 U. S. 216. On this ground as well as that of the meaning of the words, the act had been construed as in Texas by the Supreme Court of Arizona. *Ruff* v. *Hand*, 24 Pac. Rep. 257. In view of the history of the section we shall spend no more time upon the question. Even were it more doubtful, we are of opinion that the amendment of 1891 to par. 842 makes the meaning plain. The words "then [necessarily after the end of the term] said motion shall be denied," show that the motion is disposed of at the end of the term. Furthermore they do not mean that an order must be made out of term because of the failure to make an order within it, but mean that the motion shall be barred by the lapse of time, adopting the decision of the year before in *Ruff* v. *Hand*, and save an exception as if the motion had been denied by the court. The amendment assumes or enacts that the motion is to be deemed overruled at the end of the term, and has for its object to give the party an exception in case he appeals from the judgment, so that the propriety of granting the motion may be reviewed along with the other matters brought before the Supreme Court. See *Spicer* v. *Simms*, 57 Pac. Rep. 610.

It is urged that at least the statute cannot be meant to operate when the postponement is for the convenience of the court, and the case is likened to those where a judgment or order is entered *nunc pro tunc* in order to prevent a loss of rights through a delay caused by the court itself. But there is no need of an exception in such a case. The party's rights are saved but transferred for consideration to a higher court, and were it otherwise we should hesitate to read the exception into such absolute words.

It is said that by the foregoing construction the legislature attempts an unconstitutional assumption of judicial functions. But this is a mistake, both in form and substance. In form because the legislature does not direct a judgment but merely removes an obstacle to a judgment already entered. (We need not consider whether a different construction would be adopted if the statute dealt with the time for entering judgments.) In substance, because we no more can doubt the power of the legislature to enact a statute of limitations for motions for a new trial than we can doubt its power to enact such a statute for the bringing of an action. It may be questioned whether there would be any constitutional objection to a law making the original judgment final and doing away with new trials altogether. "Rehearings, new trials are not essential to due process of law, either

in judicial or administrative proceedings." *Pittsburg, Cincinnati, Chicago & St. Louis Ry.* v. *Backus*, 154 U. S. 421, 426. See *Montana Co.* v. *St. Louis Mining & Milling Co.*, 152 U. S. 160, 171. The statute did not deal with the past or purport to grant or refuse a new trial in a case or cases then pending, but performed the proper legislative function of laying down a rule for the future in a matter as to which it had authority to lay down rules. Whether the attempt to grant a review of the motion in case of an appeal or writ of error was valid is not before us. But certainly it does not seem an extraordinary stretch of legislative power to say that if the right to have a motion considered is lost in the lower court by lapse of time, the motion may be considered on appeal. There is no judgment by the legislature but simply a qualification of the time limit if the case goes up.

Finally, it is argued that the sections construed as we construe them are inconsistent with the grant of common law jurisdiction to the courts by Congress. Rev. Stat. §§ 1868, 1908. It is said that the right to grant new trials was a well recognized incident of common law jurisdiction, and that it cannot be taken away or cut down by the territorial legislature. In view of the provision in § 1866, that the jurisdiction given by § 1908 "shall be limited by law," and indeed apart from it, we should hesitate to say that the territorial legislature was prevented by the grant of common-law jurisdiction, in general words, from doing away with new trials altogether. A rule of practice like this does not touch jurisdiction in any proper sense. *Perris* v. *Higley*, 20 Wall. 375, cited by the appellant, has no application. Apart from other differences, that was a case of an attempt to confer original jurisdiction in civil and criminal cases, both in chancery and common law, upon the probate courts. We certainly see nothing to prohibit the local legislature from making this not unusual or unreasonable rule. See *Hornbuckle* v. *Toombs*, 18 Wall. 648; *Burt* v. *Thompson*, 138 U. S. 114; *Greeley* v. *Winsor*, 1 So. Dak. 618, 631.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.